

International Judicial Observer

NEWS AND COMMENTARY OF INTEREST TO JUDGES AROUND THE WORLD

A joint publication of the Federal Judicial Center and the American Society of International Law • Number 1 • September 1995

Organization of Supreme Courts of the Americas Planned

by James G. Apple

Representatives of supreme courts in the Western Hemisphere met in June in Washington, D.C., to plan a second conference of chief justices of the Americas and to make recommendations for a permanent organization of supreme courts of the hemisphere.

The first conference of chief justices of the Americas, attended by representatives of 17 countries, was held in Santiago, Chile, last November. The Chief Justice of the United States was represented at that conference by Chief Judge Juan R. Torruella (U.S. 1st Cir.). The second conference will be held October 23–29, 1995, at the U.S. Supreme Court and the Thurgood Marshall Federal Judiciary Building in Washington.

The conference planning committee included Judge Torruella, representing the United States, Canada, and Mexico; Associate Justice Josefina Calcaño de Temeltas of the Supreme Court of Venezuela, representing the Andean countries; Chief Justice Arturo Hoyos of the Supreme Court of Panama, representing Central American and Caribbean countries; and Chief Justice Raúl Alonso de Marco of Uruguay, representing “southern cone” countries.

Also participating in planning committee sessions for the United States was Chief Judge Michael M. Mihm (U.S. C.D. Ill.), chair of the U.S. Judicial Conference Committee on International Judicial Relations.

The planning committee met to recom-

mend the agenda of the October conference and to draft a proposed structure for the organization of supreme courts.

Following the planning committee meeting, Judge Torruella noted “the underlying importance that this area of the world [Latin American and the Caribbean] has to the judicial systems of the United States, both federal and state.”

He said that “sound policy” calls for the improvement of the judicial systems in all countries of the hemisphere because of increases in crime, immigration problems, and “the expansion of economic integration” affecting all of them.

The new organization, he said, “can serve as a forum for the discussion and promotion of practical solutions to common judicial problems.”

Topics to be addressed at the conference through formal presentations and discussion sessions, as recommended by the planning committee, include the following:

- judicial independence;
- due process;
- organization of justice in the Americas in the twenty-first century;
- judicial ethics; and
- impact of supra-national law on decisions of national courts.

Associate Justices Anthony M. Kennedy and Stephen G. Breyer (U.S. Sup. Ct.) will speak at the conference on judicial ethics and judicial independence, respectively.

A simulated criminal trial under U.S. procedural rules will also be conducted.

The planning committee recommended



Chief Judge Michael M. Mihm (U.S. C.D. Ill.) (center), chair of the U.S. Judicial Conference Committee on International Judicial Relations, and Chief Judge Juan R. Torruella (U.S. 1st Cir.) (second from right) review documents regarding the proposed organization of supreme courts of the Americas at a planning meeting in Washington in June. Chief Justice Arturo Hoyos of Panama sits with back to camera (conference interpreters are at left).

that the permanent organization be named the “Organization of Supreme Courts of the Americas.” It also recommended that the fundamental objectives of the organization should be to promote judicial independence and the rule of law in the hemisphere. Specific objectives mentioned by the planning committee include the following:

- serving as a permanent link between the judicial systems of the Americas, and promoting international judicial cooperation in the hemisphere;

- providing leadership for judicial education programs throughout the hemisphere;
- sharing information;
- promoting the development of regional technical assistance for the administration of justice;
- studying judicial administration and developing model procedures and/or administrative structures;
- promoting efficiency in judicial case management;

See CONFERENCE, page 4

Justices, Judges from Common Law Countries Meet in Williamsburg and Washington

Supreme court justices and judges from seven common law countries met from May 28–June 2, 1995, in Williamsburg, Va., and Washington, D.C., for the First Worldwide Common Law Judiciary Conference.

Delegates included the chief justices of Australia, New Zealand, Ireland, and India. Thirty supreme court justices and judges from those countries and the United States, Great Britain, and Canada also participated.

The purpose of the conference, according to Judge A. Paul Cotter of the U.S. Nuclear Regulatory Commission and primary organizer of the conference, was to bring together judges from the principal common law countries to discuss issues of mutual interest, common problems, and recent developments in common law jurisprudence.

Judge Cotter stated that the idea for the conference was based on two premises: (1)

the seven countries’ legal systems derive from the same common law roots; and (2) despite obvious difference in the evolution of those systems, the courts of common law countries are faced with similar procedural and substantive issues and problems.

He said that “a pragmatic judge-to-judge exchange of information on, and analyses of, particular elements of their respective courts, law, and procedures will enable the participants to take home immediate, practical benefits both for themselves individually and for their respective courts.”

Throughout the meeting, representatives of the participating nations presented papers on the “state of the courts” in their countries so that delegates would have comprehensive information about major developments and issues in the countries represented.

The first two days of the meeting, held in Williamsburg, focused on court technology and evidentiary issues. The first day’s session included a visit to “Courtroom 21—The Courtroom of the Future,” at the Marshall Wythe School of Law of the College of William and Mary. The futuristic courtroom is a joint project of the Law School and the National Center for State Courts, also located in Williamsburg.

Senior Judge Jack B. Weinstein (U.S. E.D. N.Y.) and Justice Ellen I. Picard (Ct. Q.B. Alberta, Canada) discussed issues and the status of scientific evidence in the courtrooms of the federal courts of the United States and Canada respectively during the Williamsburg session.

Issues addressed in the final three days of the conference, held in the Education Center of the Federal Judicial Center in Washington, included:

- fair trial and free press;
- status of jury trials in court systems;
- managing criminal dockets;
- crime and the family; and
- managing complex litigation.

See COMMON LAW, page 3



Chief Justice Michael E.J. Black (left) of Australia and Justice M.M. Punchhi of the Supreme Court of India at the First Worldwide Common Law Judiciary Conference in May.

International Judicial Relations Committee Promotes Communication, Coordination

by Chief Judge Michael M. Mihm
(U.S. C.D. Ill.), Chair, International Judicial Relations Committee

The Committee on International Judicial Relations was created in late 1993 by U.S. Chief Justice William H. Rehnquist and the Judicial Conference of the United States. Its purpose is to coordinate the federal judiciary’s relationship with foreign judiciaries and with official and unofficial agencies and organizations interested in international judicial relations and the establishment and expansion of the rule of law and administration of justice, and to make appropriate recommendations concerning such coordination to the Chief Justice and the Judicial Conference.

The Committee serves as a conduit for communication among the U.S. and foreign court systems and coordinates and responds to requests from foreign judges for information and training. It also cooperates with U.S. executive branch (e.g., the State Department) and private agencies to facilitate the development and administration of rule of law programs in the United States and in other countries for foreign judicial and legal officers.

Judges from the United States regularly participate in rule of law programs in other countries. Such involvement typically involves travel of one to two weeks for a series of seminars or workshops on specific topics, such as separation of powers, the independence of the judiciary, or the relationship between judge and prosecutor. For example, federal judges have been involved in recent months in several legal seminars conducted in the Russian Federation, Poland and other eastern and central European countries, and the New Independent States (former states of the Soviet Union).

The funding for these seminars and conferences is usually provided by a government agency, such as the U.S. Information Agency (USIA) or the U.S. Agency for International Development (USAID). Other programs are funded by private organizations or foundations. The judicial branch does not provide funds for such activities.

On the domestic front, many judges and legal officials from other countries travel to the United States to receive orientation about the U.S. legal system and exposure to U.S. judges at their workplaces around the country. Orientation sessions are often conducted for these visitors at the Federal Judicial Center or the Administrative Office of the U.S. Courts in Washington, D.C.

The new committee helps coordinate these activities among the federal judges and agencies in the judicial branch and provides advice and assistance for such programs.

To assist judges traveling abroad to provide technical assistance, the committee has begun collecting trip reports from judges and others who have traveled abroad—

See COMMITTEE, page 4

Inside . . .

Serving Process and Taking Discovery Abroad 2

New Publication for Judges 2

Judge’s Travel Experiences 3

Conference on Impact of International Tribunals 3

Uruguay Round Trade Agreements 4

India–U.S. Legal Exchange 4

A Brief Introduction to Procedures for Serving Process and Taking Discovery Abroad

by Susan L. Karamanian
Locke Purnell Rain Harrell
Dallas, Texas

More cases involving foreign parties and witnesses and transnational disputes are appearing in both state and federal courts. As a result, issues concerning (1) service of process abroad and (2) pretrial discovery of foreign witnesses and documents are becoming more prevalent. This article briefly discusses certain principles that are relevant to both of these areas.

Federal Rule of Civil Procedure 4(f) allows service of a summons on an individual not within a judicial district of the United States by any internationally agreed means reasonably calculated to give notice, including the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. The Hague Service Convention specifies a number of means of service, including service by mail. Many of the signatories to the Hague Service Convention, however, have reserved their rights to certain of the service procedures, so the user of the convention should examine closely the reservations lodged by the country in which service is to be performed.

Absent service under an international agreement, Rule 4(f)(2) allows service on an individual (1) in the manner prescribed by the foreign country, or (2) as directed by the foreign authority in response to a letter rogatory, or (3) if not prohibited by the foreign country, by personal delivery of the summons and complaint or any form of mail requiring a signed receipt. Service on a foreign corporation is the same as on an individual except there can be no personal delivery. See Fed. R. Civ. P. 4(h).

The starting point for analyzing how to proceed with discovery abroad is Federal Rule of Civil Procedure 28(b), which specifies that depositions may be taken in a foreign country (1) pursuant to any applicable treaty or convention, or (2) pursuant to a letter rogatory, or (3) on notice before a person authorized to administer oaths in the place where the examination is held, or (4) before a person commissioned by the

court. Corresponding rules in certain states also allow for depositions to be conducted abroad.

Sections 3 and 4 of Rule 28(b) assume a cooperative witness and/or that the foreign country will not object to the deposition. Many countries, however, preclude foreign litigants from conducting discovery within their boundaries because the discovery is perceived as violating sovereignty. Accordingly, litigants from the United States are increasingly relying on international conventions and the more burdensome, but traditional, letters rogatory to obtain discovery.

The United States is a signatory to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. The Evidence Convention provides the following: under chapter I, a standardized and simpler procedure for issuing letters rogatory (which are defined as “letters of request”); under chapter II, a formal procedure for taking of evidence by diplomatic officers, consular agents, and commissioners; and under chapter III, general clauses. The significant provisions include chapter II which, if applicable in the foreign country, prevents the foreign judiciary from interfering with discovery. Article 9 of chapter I is also significant because it provides that the executing authority of a letter rogatory will follow the requesting authority’s request that a special method or procedure be followed, unless this request is inconsistent with the internal law of the issuing state. This procedure, when applicable, allows the requesting court to use its own method of discovery in the foreign forum.

Annotated copies of these two Hague conventions and other international conventions to which the United States is a party are conveniently located in the *Martindale-Hubbell International Law Digest*. The Martindale versions identify all of the signatories and any reservations of these signatories, and they include helpful forms. Current information about the conventions can be obtained from the Treaty Affairs Section of the Legal Adviser, Department of State, Washington, DC 20520. □

SECUNDUM LEGEM

The *International Judicial Observer*: A New Publication for Judges

by Edith Brown Weiss
President, American Society of
International Law

The American Society of International Law and the Federal Judicial Center are pleased to launch a new publication: the *International Judicial Observer*. This will appear twice a year as an insert to the *State–Federal Judicial Observer*.

The American Society of International Law, founded in 1906, is committed to informing public decision makers, practitioners, scholars, and the general public about the rule of law and, in particular, about international law. An increasing number of cases involve international legal questions or questions concerning the foreign relations law of the United States. Judges need to be knowledgeable about international law and should have a place to which they can turn for some of the latest developments. The *International Judicial Observer* is intended to help fill this role. It will comment on recent developments in international law and provide a context for understanding them.

Sources of International Law

The American Law Institute’s *Restatement of Foreign Relations Law Third*, an authoritative but occasionally controversial statement of law, defines sources of international law as including international agreements (treaties and executive agreements), customary international law “that results from a general and consistent practice of states followed by them from a sense of legal obligation,” and, as sources of supplementary rules, general principles common to the major legal systems of the world. These sources of international law have grown rapidly. Since 1945 there have been more than 33,000 treaties registered with the United Nations, several thousand of them multilateral. There are many more international legal instruments that serve as evidence of international law. Indeed, it is challenging to keep abreast of the many sources of international law today.

International law is binding in the United States in both state and federal courts as part of the law of the land. The Constitution declares that treaties, together with the Constitution and U.S. laws, are “the supreme Law of the Land” (Article VI). International agreements other than treaties and customary international law are treated as federal law, and, like treaties, regarded as supreme over the laws of the individual states.

International Law Extended

Today international law extends far beyond questions of diplomatic immunities, compensation for expropriation, and extradition—subjects that have traditionally come before the courts. It includes issues of foreign sovereign immunity, extraterritorial application of national law, liability in case of accidents, seizures on the high seas, and violations of the law of nations or human rights law, to name but a few.

Sometimes judges need to address the question of whether an agreement is self-executing or non-self-executing (i.e., whether existing law is sufficient to carry out the agreement’s obligations or if additional legislation, or modification to existing legislation, is required). In some cases, certain provisions in an agreement may be self-executing and others not. If the agreement is non-self-executing, then implementing legislation is needed for it to be given effect in the United States even though the

United States could be in breach of its international obligations if it were a party in a case. Technically, it is the implementing legislation, and not the treaty itself, that is given effect.

Many agreements are self-executing and do not need implementing legislation. For

example, the provisions in treaties of friendship, commerce, and navigation that accord rights to foreigners have been treated as self-executing.

Sometimes the agreement is one that the President can make on his own constitutional authority. These sole executive agreements are also the law of the land and prevail over the laws of the states. In *Dames & Moore v. Reagan*, 453 U.S. 654 (1981), the

Supreme Court upheld the President’s action agreeing to settle U.S. claims relating to Iran before an international claims tribunal, even though it suspended claims proceedings underway in U.S. courts.

Treaties Invoked

Treaties of a general nature are also often invoked in federal and state courts. The Warsaw Convention (International Convention for the Unification of Certain Rules Relating to International Carriage by Air, 1929) has been central to numerous claims for compensation for airline accidents. Extradition treaties, anti-hijacking conventions, treaties protecting diplomats and others against certain crimes, and agreements controlling movements of hazardous wastes across U.S. borders, dumping in marine areas, and trade in endangered species are all part of the law of the land to be applied when relevant in state and federal courts.

Courts have often faced issues of sovereign immunity. Since *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), and up until 1976, the United States granted foreign governments immunity from suit in local courts, with few exceptions. As Chief Justice Marshall made clear in that case, foreign sovereign immunity was given as a matter of grace and comity rather than as a constitutionally required restriction. Countries across the world have granted sovereign immunity, even though there has never been a treaty on the subject. In 1976, the U.S. Congress passed the Foreign Sovereign Immunities Act, which codified the law of sovereign immunity and made countries subject to the jurisdiction of federal and state courts for certain kinds of actions. The case law interpreting the statute is vast and sometimes confusing.

New Dispute Settlement Procedure

The new World Trade Organization has established a far-reaching, binding dispute settlement procedure that will have implications for the application of U.S. law. The new environmental commission established at the same time as the new NAFTA regime will consider complaints and resolve disputes about compliance with environmental laws. The several regional human rights courts and commissions elaborate international human rights law. There will be international criminal tribunals for former Yugoslavia and Rwanda, and international compensation commissions and soon a new Law of the Sea Tribunal.

The *International Judicial Observer* will help judges to clarify the law in many of the above areas and will focus on the increasing array of international dispute resolution tribunals and their important decisions. □

International Judicial Observer

a joint publication of the
Federal Judicial Center and the American Society of International Law



Rya W. Zobel, Director, Federal Judicial Center
Russell R. Wheeler, Deputy Director, Federal Judicial Center
Edith Brown Weiss, President, American Society of International Law

EDITORIAL STAFF

James G. Apple, Chief, Interjudicial Affairs Office, Federal Judicial Center
Susan L. Karamanian, Esq., Executive Council, American Society of International Law

EDITORIAL ADVISORY BOARD

Chief Michael M. Mihm, U.S. District Court for the Central District of Illinois; Judge Edith Hollan Jones, U.S. Court of Appeals for the Fifth Circuit; Judge Jose A. Cabranes, U.S. Court of Appeals for the Second Circuit; Judge Ricardo H. Hinojosa, U.S. District Court for the Southern District of Texas; Judge D. Brock Hornby, U.S. District Court for the District of Maine; Judge Rudy Lozano, U.S. District Court for the Northern District of Indiana; Professor Edith Brown Weiss, Georgetown University Law Center, Washington, D.C.; Judith H. Bello, Esq., Sidley & Austin, Washington, D.C.; Charles Siegal, Esq., Munger, Tolles & Olson, Los Angeles, Cal.; Professor Ralph Steinhardt, George Washington University National Law Center, Washington, D.C.; Bruno Ristau, Esq., Ristau & Abbell, Washington, D.C.; Charlotte Ku, Executive Director, American Society of International Law, Washington, D.C.

Published in the Interjudicial Affairs Office, Federal Judicial Center, One Columbus Circle, N.E., Washington, DC 20002-8003; phone: (202) 273-4161, fax: (202) 273-4019

The opinions, conclusions, and points of view expressed in the *International Judicial Observer* are those of the authors or of the staffs of the Interjudicial Affairs Office of the Federal Judicial Center and the American Society of International Law. On matters of policy, the Federal Judicial Center and the American Society of International Law speak only through their respective Boards. The ASIL does not take positions on public policy issues.

A note to our readers

The *International Judicial Observer* welcomes comments on articles appearing in it and ideas for topics for future issues. The *Observer* will consider for publication short articles and manuscripts on subjects of interest to judges from the United States, other countries, or international tribunals. Letters, comments, and articles should be submitted to Interjudicial Affairs Office, Federal Judicial Center, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington, DC 20002-8003.

Conferences in Kyrgyzstan, Kazakhstan Provide Adventure for Illinois Judge

by Chief Judge Michael M. Mihm
(U.S. C.D. Ill.)

He lived many years ago in another country, another culture, but I am convinced that I now know how Marco Polo felt on his first trip to China—excited, anxious, curious.

Last December I traveled from my house in Peoria, Ill., to Bishkek, Kyrgyzstan, and Almaty, Kazakhstan, for a series of conferences on free press/free speech and meetings with judges from the supreme courts and constitutional courts of those two countries. The trip was sponsored by the Conference on Security and Cooperation in Europe/Office for Democratic Institutions and Human Rights (CSCE/ODIHR), an organization based in Warsaw, Poland.

For those of you who don't know, Kyrgyzstan and Kazakhstan are located immediately northwest of China and south of Siberia.

I flew from Peoria to Chicago by commuter and then overnight from Chicago to Frankfurt, Germany. Frankfurt is a major exchange point for travelers going anywhere in Western, Central, and Eastern Europe. In Frankfurt, I met the other two judges who would be participating with me in the conferences and meetings. They were Lech Garlicki, a judge of the Constitutional Court of Poland, and Judge Louis Guerra, vice president of the Constitutional Tribunal of Spain. By the time the trip had ended, we had become friends for life.

After an overnight flight from Frankfurt to Almaty (we arrived in Almaty at 5:30 a.m.), it took us an hour to secure visas and go through passport, luggage, and currency checks. Actually, successfully completing all of those tasks in one



Left to right: Dr. Fred Quinn (formerly with Conference on Security and Cooperation in Europe); Hon. Mukhae Holoponbae, Minister of Justice of Kyrgyzstan; Chief Judge Michael M. Mihm (U.S. C.D. Ill.); Judge Lech Garlicki (Pol. Const. Ct.); Eric Stepinski (CSCE); and Judge Louis Guerra (Span. Const. Ct.) at a conference on protection of free speech/free press in Kyrgyzstan.

hour would be considered "lightning fast" and was possible because of assistance of a man from the staff of the chief judge of the Constitutional Court of Kazakhstan.

We traveled by car from Almaty to Bishkek, Kyrgyzstan. This took four hours. During the journey, we passed through what has to be some of the most barren country in the world, a vast, treeless plain next to the Tien-Shan Mountains, and then up over the mountains through a narrow pass and down the other side into Kyrgyzstan. This trip between cities was a great adventure in its own right. When we arrived at the Hotel Dustik in downtown Bishkek, I had been traveling for the past 30 hours and had passed through 11 time zones. I was exhausted. Fortunately, we had the remainder of the day to rest. At the hotel, we met Dr.

Fred Quinn of CSCE/ODIHR. Fred is a retired U.S. foreign service officer and a superb person and conference leader.

Bishkek is a city of approximately 675,000. The conference was held at the Lenin Museum, a beautiful museum with a great deal of Lenin memorabilia and a huge Lenin statue in front of the building. Some things don't change very fast.

The conference in Bishkek focused on the draft press law being considered by the Kyrgyzstan Parliament. The minister of justice presided over the meeting. The draft law was severely criticized by the four of us from CSCE and several independent journalists who showed up at the conference uninvited. Our criticisms were that the law needlessly regulated the press and interfered with freedom of speech. The dis-

cussions were emotionally charged because two independent newspapers had been shut down by the government just two weeks before our visit.

We were only in Bishkek three days, and much of our time was taken with the conference and meetings with the ministry of justice, but we also met for extended discussions with judges from the Supreme Court to discuss their court structure.

We left Bishkek and traveled back over the mountains to Almaty. Almaty is a city of 1.5 million people. In Almaty we spent several days meeting with judges and conducting a conference on free press and free speech. Since Kazakhstan, like Kyrgyzstan, is still in the process of deciding on the permanent structure of its court system, most of our conversations with members of the Supreme Court and Constitutional Court dealt with issues of court structure and separation of powers.

Almaty is a city of contrasts. Because the city had not paid its natural gas bill to Tajikistan, there was no natural gas the first three days we were there; I stood in a "bread line" for the first time; we attended the Almaty Symphony, which is world class and featured five child prodigies (all under the age of ten), three on piano and two on violin; I had dinner in the home of two wonderful American lawyers, Lowry and Barnabas Wyman, who work for the American Legal Consortium under very difficult conditions—on the occasion of my visit for dinner, they had neither natural gas for heat nor electricity for light. We had a delightful dinner by candlelight.

I came home from the trip with great admiration for what the men and women judges in those two countries are doing in an effort to establish a rule of law. I didn't kiss the ground when I got back to Peoria, but I did count the blessings that we have as independent judges in a free society. □

NYU Conference Discusses Impact of International Tribunals

by Thomas M. Franck
Professor of Law, Center for
International Studies
New York University School of Law

Three justices of the International Court of Justice, three judges and the chief prosecutor of the International Criminal Tribunal for the Former Yugoslavia, and three associate justices of the U.S. Supreme Court were among the participants at a major international law conference at the New York University Law School in February.

The conference, convened to address "The Reception of National Courts of Decisions of International Tribunals," also included representatives of the Court of Justice of the European Community, the European and Inter-American Courts of Human Rights, the Iran-United States Claims Tribunal, the Supreme Court of Canada, the Law Committee of the House of Lords of the United Kingdom, the constitutional courts of Germany and France, the constitutional court of the Russian Federation, and several U.S. courts of appeal and district courts.

Associate Justice Sandra Day O'Connor (U.S. Sup. Ct.) co-chaired the conference with representatives of the NYU Law School.

Issues raised at the conference that would affect U.S. courts include the following:

- How will national courts (which have traditionally been deliberately shielded from external control) accommodate to the burgeoning jurisprudence of these new supranational or non-national tribunals?
- What will a U.S. court do with a request for the "surrender" to the International Criminal Tribunal's jurisdiction of a person charged with war crimes in Bosnia?
- In a dispute over title to property, what

weight would a U.S. judge give to a decision of the International Court that the state under whose laws title was purportedly obtained was illegally in possession of it?

In addition to addressing "faith and credit" issues posed to national courts by the decisions of international adjudications and arbitrations, the conference also addressed the extent to which national judges defer to the corpus of law made by international tribunals.

Discussions among the conference participants suggested that the practice of applying that body of law to cases before national courts varies widely, with U.S. judges being less likely than their counterparts in Germany or France to seek guidance from the jurisprudence of the international tribunals or foreign courts. This situation was attributed to the relative insularity of U.S. courts and also the lack of an international perspective in the pleadings of most U.S. attorneys, as well as the U.S. system of legal education that often trains judges, attorneys, and law clerks without reference to foreign, comparative, or international perspectives.

Themes emerging at the conference, according to Dean John Attanasio of St. Louis University Law School, rapporteur, included the following:

- sovereignty as the continuing dominant organizing principle of world public order, as long as nation-states continue to control sources of violent force and capital;
- the ascendancy of international institutions and the weakening of sovereignty in the global community;
- the increasingly important role of judicial institutions and the rule of law around the world;
- the "overarching trend" and shift in power in the world order away from sov-

eignty and toward a greater acceptance of a variety of supranational decision-making authorities of limited competencies;

- the threat to national sovereignty posed by international tribunals if their judgments are enforced by domestic courts;
- the impediment of such doctrines as the act of state doctrine, sovereign immunity, and the doctrine of non-executing treaties embraced by national courts to "breaching the wall" of sovereignty;
- the common language spoken by judges helpful in international understanding;
- the greater acceptance of decisions of international tribunals by domestic courts in the area of commercial disputes;
- the major international development of regionalism, which accounts for the success of such courts as the European Court of Justice and is an important variable in the development of international institutions;
- economic globalization, which has encouraged greater shifts in sovereign power to international organizations; and
- the influence of the decisions of national courts on international tribunals.

The conference, conducted under the aegis of the N.Y.U. Center for International Studies and Institute of Judicial Administration, was made possible by grants from the Ford, Bankers Trust, and Eugen Friedlaender Foundations. It is the first of a regular series of meetings between U.S. and foreign judiciaries planned by N.Y.U. as part of the law school's new "Global Law School" program.

Additional information about the conference proceedings can be obtained by writing Professor Thomas M. Franck, director, Center for International Studies, New York University School of Law, 40 Washington Square South, New York, NY 10012. □

COMMON LAW, from page 1

At a luncheon speech at the Canadian Embassy, Associate Justice Sandra Day O'Connor (U.S. Sup. Ct.) spoke to the delegates on reforming jury trials in the United States.

The conference concluded with a presentation by Chief Judge J. Clifford Wallace (U.S. 9th Cir.) on the advantages of the conference and the reasons why it should be continued.

Judge Wallace observed that there are 43 countries around the world that share a common law heritage and 25 additional countries have "substantial common law aspects." He suggested suitable discussion topics for future conferences: commonality of roots and traditions, the adversarial system, technology, the jury system, court television, and handling complex cases.

Delegates from Great Britain commented that the conference was "the only meeting of judges not replicated in any other forum." They stated that "the particular issues and problems which arise in the conduct of common law litigation can usefully be discussed among such a group of judges. [The conference] brings together the judicial experience from every continent."

The delegates voted unanimously to hold future conferences. Their preference was to hold a conference every three years.

The delegation from Ireland indicated an interest in hosting the next conference.

The conference was sponsored by the Judiciary Leadership Development Council (JLDC), a Washington based nonprofit corporation with a mission of conducting judicial education conferences and seminars. Judge Cotter is the vice president of the JLDC.

The president of the JLDC is Senior Judge John W. Kern III (D.C. Ct. App.). □

Uruguay Round Trade Agreements Rank in Importance to GATT, EC; Dispute Resolution Reforms Included in New Multilateral Trade Regime

by David W. Leebron
Professor of Law, Columbia University

On January 1, 1995, the Uruguay Round multilateral trade agreements entered into force. These agreements, which had been negotiated over 8 years, span over 400 pages and include 15 separate new agreements and numerous "Understandings," "Decisions," and "Declarations." These new trade agreements rank in their importance with the original General Agreement on Tariffs and Trade (GATT) and the formation of the European Community.

In broad sweep, the Uruguay Round agreements achieved four basic reforms. First, they reformed the institutional structure of the GATT by establishing the World Trade Organization (WTO) and streamlining dispute settlement procedures. Second, they strengthened and clarified existing GATT rules in several areas, most significantly unfair trade remedies (antidumping and countervailing duties) and safeguards (actions to temporarily protect domestic industry when it is injured by fairly traded imports). Third, they applied GATT rules to two "renegade" sectors, agriculture and textile, that although nominally subject to the GATT, had in fact been outside GATT discipline. Finally, they brought new areas into the multilateral trade regime, notably services and intellectual property.

These agreements were implemented in the United States by the Uruguay Round

Agreements Act, which was passed by Congress last fall. This implementing legislation and the agreements are for the most part only of interest to judges directly involved in international trade cases. Thus the bulk of the Act implements modifications to antidumping and countervailing duty proceedings, reforms certain agricultural trade policies, and modifies U.S. copyright, trademark, and patent law to conform to the Uruguay Round Agreement on Trade Related Aspects of Intellectual Property. Still, the agreement and implementing legislation contain a number of provisions of which all judges should be aware.

First, the Uruguay Round Agreements Act, and not the agreements themselves, will be applied in any litigation. Although Congress specifically approved the Uruguay Round trade agreements, it also declared in the Act that no provision of any of those agreements inconsistent with U.S. law shall have any effect, and that no person may base any cause of action or defense on the Uruguay Round agreements. Congress thus followed recent treaty practice by effectively declaring that the provisions of the agreements are not self-executing for purposes of U.S. law.

Beyond those specifically concerned with trade laws, the most important aspects of the agreements govern product standards. The agreements on Technical Barriers to Trade and on the Application of Sanitary and Phytosanitary Measures (governing standards for food and agricultural

products) require that the application of product standards not create any unwarranted barriers to international trade. Congress, however, again explicitly provided that nothing in the implementing legislation should be construed to modify any law of the United States, including laws for the protection of human, animal, or plant health, the protection of the environment, or worker safety.

The provisions regarding state law are more complex, but Congress basically intended to preclude the use of the Uruguay Round agreements to challenge state regulatory actions in private or public litigation. Nonetheless, it is a basic canon of statutory construction that statutes should not be construed in violation of international law or treaty obligations. And whereas the GATT of 1947 had never been specifically approved by Congress, the Uruguay Round agreements have been. Earlier judicial decisions giving the GATT extremely little weight may therefore be less applicable to the Uruguay Round agreements. Although no statute could be challenged on the basis that it violates those agreements, the agreements could be taken into account in construing a statute or in reviewing administrative actions. (The Statement of Administrative Action that was submitted by the President to Congress is, under the statute, the authoritative expression on the interpretation and implementation of both the agreements and the implementing legislation.)

Unless the federal government brings a

proceeding to challenge state action, a trading partner of the United States would have to initiate dispute settlement proceedings in the World Trade Organization. That process is open only to the member governments of the WTO; private parties have no standing to bring an action. If the United States were determined to be in violation of its obligations under the WTO agreements, the federal government could move to reform its administrative practices, but only after consultation with Congress. Any state law found to violate the WTO agreements would have to be changed only if the United States prevailed in an action brought for that purpose.

Federal judges should also be aware of a change in the jurisdiction of federal courts occasioned by a provision in the implementing legislation intended to bring United States law into compliance with an earlier GATT dispute settlement panel report. Defendants in International Trade Commission proceedings under section 337 of the Tariff Act of 1930 will now be permitted to assert counterclaims in those proceedings, but these must be immediately removed to federal district courts. (28 U.S.C. § 1368 now provides the federal courts with original jurisdiction over such claims.) In addition, federal court proceedings involving the same issues as a pending section 337 proceeding must be stayed on the request of a party who is a respondent in a section 337 proceeding. □

India-U.S. Legal Exchange Includes Supreme Court Justices, Lawyers

Chief Justice A.M. Ahmadi of the Supreme Court of India led a delegation of Indian justices, judges, and lawyers to the United States in May to complete the second part of the India-U.S. Legal Exchange. A group of U.S. justices, judges, and lawyers visited India in June of 1994.

Included in the Indian delegation were Justices Kuldip Singh, J.S. Varma, M.M. Punchhi, and K. Ramaswami of the Supreme Court of India; Chief Judge M.J. Rao of the Delhi High Court; Dipankar P. Gupta, Solicitor General of India; Fali S. Nariman, President of the Bar Association of India; and four members of the Indian bar.

The exchange opened with the Indian delegation attending a non-argument session of the U.S. Supreme Court.

Another session during the Washington, D.C., part of the program was held in the East Conference Room of the U.S. Supreme Court Building and presided over by Chief Justice William H. Rehnquist.

Chief Justice Rehnquist, in opening the formal session at the Supreme Court, noted the common heritage of the United States and India, "one the oldest democracy and the other the largest democracy."

"In preserving human rights and strengthening the judiciary we should proceed together," said the Chief Justice.

Associate Supreme Court Justices Antonin Scalia, Ruth Bader Ginsburg, Sandra Day O'Connor, and Stephen G. Breyer also participated in the first session. Justices Scalia and Ginsburg led a discussion on the role of dissenting opinions in appellate practice.

The group also heard presentations on the court system of the United States and judicial education at the Federal Judicial Center.

Following the Washington program, the Indian delegates traveled to Williamsburg, Va., for sessions at the National Center for State Courts, and to New York City.

In New York the delegation visited the U.S. Court of Appeals for the Second Circuit for discussions with judges and to hear appellate oral arguments. The Bar Association of the City of New York and New York University Law School hosted dinners for the delegation.

Members of the American College of Trial Lawyers also participated in the exchange. □

CONFERENCE, from page 1

- promoting modernization of court systems through automation and technology;
- promoting access to justice;
- promoting the adoption of, and compliance with, judicial ethics standards; and
- conducting regional or hemispheric meetings on specialized legal topics of interest to members.

Some of the major structural and procedural recommendations proposed by the committee are the following:

- each country that is a member of the Organization of American States would be eligible for membership;
- the organization would be a neutral forum for the exchange of information and discussion of issues. The organization would not impose any measures or actions regarding any of the member countries.
- each country would have one vote—those countries sharing a common supreme court would collectively have one vote;
- the chief justice of the national supreme court (or designate) would participate in the organization—the national delegation could be comprised of more than one delegate, but only one representative per country would have voice and vote at one time;
- at plenary meetings, held at least once every three years, a host for the next meeting (and a planning committee for that meeting) would be chosen—the planning committee would include equal representation from each of the four hemispheric regions (North America and the Caribbean; Central America; the Andean Pact Countries; and the southern cone/Brazil);
- commencing after the October conference, the chief justice of the country hosting the next conference would be the president pro tempore of the organization for the purpose of organizing the next meeting;
- official languages would be Spanish and English;
- cost of each conference would be borne by the host country—each delegation will pay its own transportation costs to the conference site, while payment of room/board and ground transport costs will be determined on a case-by-case basis by the host country; and
- annual membership dues would be \$2,000 (U.S.) per voting unit, payable not later than February 1st of each year.

The planning committee recommended that a secretariat be established in Panama

to serve as repository for organization records. The secretariat would also disseminate information to members, would manage the organization's finances, and would coordinate the activities of the organization.

The planning committee's recommendations will be circulated to participating countries for comments and suggestions and then submitted to the plenary session of the conference in October.

The proposed new organization of supreme courts reflects judicial interest in reform and rule of law issues throughout the hemisphere, resulting from the vast transformation that countries in Central and South America have undergone in the past 15 years.

Democracies and free elections have replaced military dictatorships in more than a dozen countries of the region. New, friendlier commercial climates in many of the countries have attracted new capital and foreign investment. The North American Free Trade Agreement has created the largest free trade area in the world. And the creation of new democratic regimes has heightened concerns for the protection of human rights in those countries.

Such vast changes place new demands on the legal systems of all countries of North and South America, and the proposed new organization is one response to those demands. □

COMMITTEE, from page 1

judges who have traveled to a certain country can provide valuable background assistance and information to other judges who may be traveling to that country. The Committee is also developing other pre-trip briefing materials for judges.

Another project of the Committee is developing a database of speeches on a variety of commonly addressed topics to assist judges in preparing presentations for foreign seminars and conferences.

Federal judges traveling to another country to participate in a technical assistance program should contact Guy Molok, staff attorney for the Committee, at the Article III Judges Division, Administrative Office of the U.S. Courts, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington, DC 20002, phone (202) 273-1864. □



Chief Justice A.M. Ahmadi of India addresses members of the Bar Association of the City of New York during the India-U.S. Legal Exchange in May. Left to right: Fali S. Nariman, President of the Bar Association of India, Chief Judge Jon O. Newman (U.S. 2d Cir.), Chief Justice Ahmadi, and Mrs. Ahmadi.